

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN LOPEZ, JR. and ELAINE LOPEZ,

Plaintiffs,

v.

ANN C. WALTON and DONALD T. KENNISON,

Defendants.

AMENDED ANSWER

Case: 6:19-cv-727(LEK/ATB)

The defendants, ANN C. WALTON and DONALD T. KENNISON, by their attorneys BARTH SULLIVAN BEHR LLP, as and for their amended answer to the plaintiffs' complaint allege as follows:

1. Admit paragraphs 5, 6, 7, 8, and 12 of the complaint.
2. Deny knowledge or information sufficient to permit them to admit or deny paragraphs 1,2,3,4,9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, 30, 32, and 33 of the complaint.
3. Deny each and every allegation in the within complaint not herein above specifically admitted, denied or controverted.

FIRST AFFIRMATIVE DEFENSE

4. The injuries of plaintiff JOHN LOPEZ, JR. resulted from the negligence, recklessness, want of due care and other culpable conduct of the plaintiff including assumption of risk, without any culpable conduct on the part of the answering defendants contributing thereto.

5. Accordingly, the answering defendants are entitled to judgment dismissing the complaint, or in the alternative, reducing the amount of damages to which the plaintiffs are entitled, if any, according to the proportion that the culpable conduct of the plaintiff, JOHN LOPEZ, JR. bears to the culpable conduct of the defendants.

SECOND AFFIRMATIVE DEFENSE

6. That by entering into the activity in which the plaintiff JOHN C. LOPEZ, JR. was engaged at the time of the occurrence set forth in the complaint, said plaintiff knew the hazards thereof and the inherent risks incident thereto and had full knowledge of the dangers thereof; that whatever injuries and damages were sustained by the plaintiff herein as alleged in the complaint arose from and were caused by reason of such risks voluntarily undertaken by the plaintiff in the activities and such risks were assumed and accepted by the plaintiff in performing and engaging in said activities.

THIRD AFFIRMATIVE DEFENSE

7. This court lacks jurisdiction over the person of the answering defendants.

FOURTH AFFIRMATIVE DEFENSE

8. Upon information and belief, the plaintiff JOHN LOPEZ, JR. failed to use an available and operable seat belt at the time of the accident herein, and, had such seat belt been worn, some or all of plaintiff's injuries would have been prevented. Pursuant to applicable law, plaintiff may not recover damages for those injuries which would not have been incurred had such seat belt been worn.

FIFTH AFFIRMATIVE DEFENSE

9. In the event of any prior or subsequent settlement entered into between plaintiffs and another person or persons liable, or claimed to be liable, in tort for the same injury or wrongful death complained of herein, the defendant asserts all relevant provisions of General Obligations Law §15-108.

SIXTH AFFIRMATIVE DEFENSE

10. Upon information and belief, the plaintiffs have and/or will be reimbursed and/or indemnified for all or part of any economic loss, including medical care, dental care, custodial care or rehabilitation services, and loss of earnings claimed, and the answering defendants are entitled to an offset and/or deduction from any award for any and all collateral source payments or benefits received or to be received by plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

11. The answering defendants were confronted by an emergency situation and/or unavoidable accident, and acted in a reasonably prudent manner under the circumstances.

EIGHTH AFFIRMATIVE DEFENSE

12. The plaintiffs have failed to mitigate their damages, and the answering defendants are entitled to an offset and/or deduction from any award for loss of earnings.

WHEREFORE, the defendants, ANN C. WALTON and DONALD T. KENNISON demand judgment dismissing the plaintiffs' complaint; in the alternative, a trial by jury of all issues in this matter; and awarding the costs and disbursements of this action, together with other appropriate relief.

August 12, 2019 August 12, 2019

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